

Presentation of Fibertech Networks to Federal Communications Commission Regarding Deployment of Competitive Network Facilities

BACKGROUND: Information on Fibertech Networks' experience regarding access to poles and conduits

Fibertech Networks is based in Rochester, NY. We build and operate local "open-access" fiber-optic networks.

Failure of Utilities to Provide Reasonable and Nondiscriminatory Access to Poles and Conduits: ILECs and power companies refuse to provide "reasonable and nondiscriminatory" access to their poles and conduits as required by law. Most power companies have a telecom affiliate subsidiary.

Delays:

- 45-day deadline for surveying and licensing poles or conduit or issuing statement of necessary make-ready work is virtually never met; utilities often delay for 6 to 12 months.
- Many pole attachment agreements specify a deadline for completing make-ready work usually 180 days from completion of survey. These deadlines are routinely breached.
- Some ILEC's require route-specific, rather than destination-specific conduit applications, making competitors guess where available conduit might be located and treating each subsequent application as restarting the 45-day deadline and application process search fees. Competitive network providers have called this the "go-fish" process. As a result of this process, a conduit location process that would take the ILEC several days to accomplish for its own purposes might take a competitor a year to complete, and at a costly penalty.

Excessive Costs:

- Rule that license applicant pay only the "actual costs of make-ready or pole change-out work necessitated by the applicant's attachment" is typically breached: utilities often require Fibertech to pay to correct pre-existing construction violations.
- Utilities require Fibertech to pay for more work than is necessary. For example: replacing a pole at approximately \$5,000 when needed space could be created by moving 3 lines at approximately \$250 total.
- Application, survey, and "engineering" costs can range from \$7.50 per pole to \$285 per pole, depending on the utility.

Anticompetitive Results:

- Facilities that an ILEC or power-company affiliate could install for its own purpose within one month of the decision to deploy them, for \$10,000 per mile, might take a competitor two years and \$35,000 per mile to install.

Little or No Incentive to Comply:

- Because there is no direct penalty for delaying competitors and for demanding excessive fees, utilities delay and impose unwarranted costs. When a competitor files a complaint, the utility has at least achieved delay, has imposed on the competitor the costs of pursuing the complaint, and, at worst, will simply be instructed to do what it should have done in the first place. Utilities come closest to compliance with rules where a state PSC aggressively

regulates poles and conduits but virtually ignore the law where a state PSC with jurisdiction does not support competition.

Even Strict Compliance with Commission's Substantive Standards Yields Discrimination:

- When an ILEC decides to deploy fiber, it will not wait 45 days after making that decision before it determines what make-ready work will be required, and it will not wait 180 days before completing that work no matter how small the construction project may be. Thus, under existing rules, the ILEC will virtually always achieve significant advantage over another company seeking to deploy fiber to compete with the incumbent.

POLICY RECOMMENDATIONS

Any policy designed to shift CLEC's from UNE-based service to facilities-based competition needs to be accompanied by reform of the ILECs' and electric companies' pole and conduit licensing practices, which otherwise will prevent the successful deployment of competitive facilities.

Recommended New Substantive Approaches to Achieving Nondiscriminatory Access:

1. Require recovery of make-ready costs through annual rental fees

(a) Direct that pole owners recover make-ready costs through annual rental fees rather than up-front charges. The Commission's methodology for calculating the annual rental fee permits a utility to recover make-ready costs in either manner. As long as an ILEC or an electric company with financial interests in a telecom venture is able to collect make-ready costs from competitors as up-front charges, it will be motivated to require unduly expensive make-ready work and to charge applicants fees to correct existing non-compliant conditions. Using rental fees to recover make-ready costs would spur efficient make-ready decisions, whether the work is performed to accommodate the utility or a competitor, because the utilities would share these costs. This also would promote equity because licensees today share the make-ready costs incurred to achieve the utilities' business purposes;

(b) Establish and enforce shorter deadlines for determining and completing make-ready work that properly reflect the amount of work to be performed. Deadlines need to be shorter than 45 days and 180 days where only a few poles are involved;

(c) Award damages or impose heavy penalties for failure to meet make-ready deadlines; and

(d) Prohibit the "go fish" process of conduit licensing, requiring instead that utilities provide access to records indicating location of available conduit. Establish a specific reasonable timeframe for a response to a conduit application of no more than a week to 10 days.

OR:

2. Permit Temporary Attachments

(a) Permit pole license applicants to attach to a pole temporarily using an extension arm, where it is consistent with National Electrical Safety Code (NESC). This would be allowed

if deadline for completion of make-ready work has not been met or if the applicant and the utilities have a dispute concerning make-ready work or charges and the applicant is able to establish a prima facie case that the work or charges prescribed are unreasonable or otherwise unlawful. Resolution of the dispute would occur after the temporary attachment is made. Permitting temporary attachments would allow the applicant to deploy facilities in a timely manner while avoiding the pressure to succumb to unlawful money demands;

(b) Establish and enforce shorter deadlines for determining and completing make-ready work that properly reflect the amount of work to be performed; and

(c) Require that utilities provide access to records showing location of available conduit.

Recommended Actions:

1. Include consideration of pole and conduit access issues in various ongoing Commission proceedings relating to competition in the telecommunications marketplace.

- To the extent that the Commission contemplates policy changes favoring, or relying upon, the deployment of competitive facilities, a crucial piece of the "policy puzzle" will be the question of competitors' access to utilities' poles and conduits.

2. Commence proceeding to undertake a comprehensive review of pole and conduit access.

- The Commission has not conducted a comprehensive review of pole and conduit access since the advent of competition following passage of the 1996 Act. An examination of the actual practices of utilities relating to licensing of poles and conduits to competitive providers and the effect of such practices on competition would provide a valuable foundation for future Commission policy-making.
- A notice of inquiry, followed by a notice of proposed rulemaking possibly articulating some of the substantive recommendations set forth above, would significantly advance the deployment of competitive facilities.

3. Engage in proactive enforcement proceedings to deter anticompetitive conduct.

- Creation of a "rocket docket" for pole and conduit access complaints would make more viable the option of seeking redress through the Commission.
- ILEC commitments regarding pole and conduit access made in the context of 271 proceedings are commonly forgotten after the 271 approvals are obtained. Periodic examination of compliance with such commitments, combined with imposition of heavy penalties where noncompliance is found would be extremely valuable to the promotion of competitive facilities development.
- Fibertech has experienced the same anticompetitive conduct by pole and conduit owners repeatedly as it has sought to build facilities in its various markets. The Commission could deter such serial flaunting of the law by treating rulings rendered pursuant to

individual pole attachment complaints as presumptively applicable to all utilities. The imposition of heavy penalties when another utility engages in the same practices is justified.